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The Supreme Court of the United States

OCTOBER TERM, 1941.

JOHN FOWER, W. J. CORDNER, M. E. KARTCHNER, JR., and RAY E. LOVELESS,
Petitioners and Plaintiffs Below,
vs.
PROVO BENCH CANAL AND IRRIGATION COMPANY, a Corporation, and Its Board of Trustees, RAY V. WENTZ, A. G. KEETCH, LEONARD WALKER, JOHN STRATTON, EMERY McKELLIP, NIELS ANDERSON, and A. LOWE,
Respondents and Defendants Below.

Petition for Writ of Certiorari to the Supreme Court of Utah

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

That they, and each of them, are and at the time the above entitled action was commenced were the owners of shares of capital stock of the respondent and defendant below, Provo Bench Canal & Irrigation Company, a mutual irrigation company, hereinafter referred to as the "Company," organized and existing under the laws of the State of Utah. The personal respondents and defendants below are and at the time of the commencement of this action in the court below were the trustees of the respondent com-

pany. The company was organized February 26, 1887, for the object or purpose of conveying "water from Provo River to Provo Bench and lands adjacent thereto and to regulate and control the same for the purposes of irrigation. (R. 39). The life of the corporation under the original articles was for a term of twenty-five (25) years. On January 8, 1910 the articles of incorporation were amended so that the life of the company was extended to fifty (50) years. (R. 42). On January 9, 1937, the articles of incorporation of the company were extended to one hundred (100) years from the date of its original incorporation. (R. 44). The authorized capital stock of the company is three thousand (3,000) shares, (R. 43), but at the time this action was commenced and immediately prior thereto there were outstanding and fully paid up one thousand nine hundred fifty-four (1,954) shares of the capital stock of the defendant company. (R. 21). On May 7, 1938, a meeting of the stockholders of the company was held, at which meeting a resolution was passed by a majority of the stockholders of the company authorizing and directing the board of trustees of the company to subscribe for two thousand (2,000) shares of the capital stock of the Provo River Water Users' Association, hereinafter referred to as the "Association." (R. 53). The vote on the resolution was one thousand twenty-eight and eighty-nine hundredths (1,028.89) shares of the capital stock of the company voting in favor thereof and six hundred sixty and ninety-three hundredths (660.93) voting against the adoption of the resolution. (R. 45). At the same meeting a resolution was passed by a vote of one thousand twenty-nine (1,029) shares of the company voting in favor of and one-half (½) share voting against a resolution to amend the articles of incorporation of the company. (R. 45).

By the resolution so passed the objects and purposes of the company were enlarged to the effect that the company might:

> "own, acquire by purchase, or otherwise, dams, reservoirs, canals and other irrigation works,

water and water rights and/or lands, easements in lands and other property incidental or necessary to accomplish the objects and purposes hereinabove and hereinafter enumerated, and to divert, control, and distribute the waters owned or held by it for the use of its stockholders, and to do any and all things necessary, convenient, or incidental to the enjoyment of such objects and purposes;

"To enter into contracts with the United States or with other parties for the purchase, acquisition, or lease of water rights, and lands, easements in lands, dams, reservoirs, canals, and necessary irrigation works, or parts thereof, and other property, incidental to or necessary for the full enjoyment thereof, and to contract with the United States or other parties for the construction of such works;

"To mortgage, pledge or otherwise encumber its property, both real and personal, to secure the payment of its debts and obligations;

"To subscribe for, purchase or otherwise acquire and own stock, in other corporations organized or to be organized, and to purchase its own capital stock and in carrying out its contracts with the United States, or any department thereof, or with other persons, firms, or corporations in the exercise of its powers herein granted, to make and deliver its promissory notes, guarantees, mortgages and other obligations in such form and on such terms and conditions as to its Board of Trustees may be or appear to be necessary and proper, and to secure, guarantee and become surety for the payment or the performance thereof, or of any contract, promissory note, or other obligation that may be or has been entered into with the United States or with any other person, firm, or corporation in which this corporation has

acquired, by subscription, or otherwise, shares of stock, water or water rights and other rights incidental thereto;

"This corporation in addition to the powers herein enumerated, shall have the power to do any and all things necessary or proper in the carrying out of its business as an irrigation corporation, limited only by the laws of the State of Utah and of the United States of America. . . . That the capital stock of this corporation shall be assessable for any and all corporate purposes." (R. 46-47).

The resolution passed by a majority of the stockholders of the company with respect to entering into a contract for the purchase of additional water provides:

"That the Board of Trustees of the said Provo Bench Canal & Irrigation Company be, and it is hereby authorized and directed to subscribe for 2000 shares of the capital stock of the Provo River Water Users' Association, a corporation, to the end that this corporation may acquire adequate supplementary water supply for the irrigation of the lands of its stockholders from what is commonly known as the Deer Creek Division of the Provo River Project, and

"BE IT FURTHER RESOLVED that the said Board of Trustees be, and it is hereby authorized to enter into necessary contracts with the said Provo River Water Users' Association and to provide for the payment therefor in accordance with the requirements and regulations of the said Provo River Water Users' Association, and according to the requirements of the United States, with which the said Provo Water Users' Association has entered into contracts for the construction of what is commonly known as the Deer Creek Division of the Provo River Project by which said supplementary water supply can

be obtained, and BE IT FURTHER RESOLVED that said Board of Trustees be authorized to do any and all acts and things necessary to subscribe for and acquire said stock in the Provo River Water Users' Association, and to pay for the same." (R. 45).

It is made to appear by the terms of the proposed contract that the Association was organized, among other things, for the purpose of contracting with the United States of America for the construction of certain irrigation and reclamation works in Utah, for the development, storage, diversion and beneficial use of the waters of the Provo, Weber and Duchesne rivers, and their tributaries, for irrigation, municipal, industrial and other purposes, and for the repayment of the costs of construction of such works by the Association from money collected from those who purchase the water so developed and stored. (R. 50-51).

The contract which the company intends to enter into with the Association contains, among others, the following provisions:

"The company desires to secure an additional water supply for the use of its stockholders and others through the purchase of shares of stock in the Association and through the construction of said works." (R. 52).

"The company agrees to and does hereby subscribe for 2000 shares of the stock of the Association and agrees to pay the Association the full purchase price of said shares of stock. The company agrees to pay any and all assessments and/or calls assessed and levied by said Association from time to time against said shares of stock of the Association owned by the company, including such deficiency assessments on account of the anticipated and/or established failure of some other stockholder of the Association to pay assessments and/or calls when due as may be necessary within

the limitation provided for in Article 14 hereof, to enable the Association to pay in full when due the Association's indebtedness to the United States under said Association-Government contract." (R. 53).

"The company shall pay as the purchase price of the shares of stock in the Association herein subscribed for that proportion of the total sums and charges required to be paid by the Association to the United States under said Association-Government contract for the construction of the works therein described and provided for, as computed and determined by the secretary in conformity with the provisions of Article 22 of the Assocation-Government contract, that the number of shares of Association stock subscribed for by the company shall bear to the total number assessable at the time the construction of the works described in Article 2 hereof is authorized by the secretary unless permitted by the secretary to use a different number of shares as the basis of computation, in which event the purchase price of shares of stock will be that proportion which the number of shares of stock subscribed for by the company shall bear to the total number of shares of stock outstanding and assessable at the time such permission is given. In case doubt should arise as to the amount of the purchase price herein assumed by the company, the matter shall be referred to the secretary, whose finding shall be final and binding on the parties to this agreement." (R. 53).

"The sums or amounts to be paid under this contract (including deficiency assessments as stated in Article 8) as charges due the Association are to be paid by the company in full without deductions on account of the failure of some of the stockholders of the company to pay assessments and/or calls when due, and the company agrees to levy

and collect such deficiency assessments (to cover estimated and/or established deficiencies) as may be necessary to enable the company to pay such sums or amounts in full when due." (R. 54).

"The company in the distribution of the water supply acquired hereunder shall comply with the provisions of the Act of June 17, 1902 (32 Stat., 388) and acts amendatory thereof or supplementary thereto, particularly those of the Warren Act of February 21, 1911 (36 Stat. 925) and regulations of the United States applicable thereto. and shall not furnish or deliver to any one landowner water in excess of an amount sufficient to irrigate 160 acres of irrigable land. . . . The basis, the measure and the limit of the right of the company to use of said water acquired through its subscription for shares of stock of the Association shall rest perpetually in the beneficial application of the same. The company shall cause said water to be put to a beneficial use in accordance with the law." (R. 54-55).

"The company agrees to pay those operation and maintenance assessments levied by the Association on the shares of stock owned by the company in the Association, including deficiency assessments as may be necessary to pay in full the operation and maintenance expenses incurred by the Association in operating and maintaining said work and other works otherwise acquired, owned, controlled and/or operated by the Association, except as to the Provo Reservoir Canal enlargement." (R. 57).

"Anything herein to the contrary notwithstanding, it is agreed that the total aggregate liability of the company for payment under the terms of this contract:

(a) To the Association, for the purchase price of the stock of the Company in the

Association shall not exceed the sum of $152,000; and

(b) To the Association, on account of the default of some other stockholders in the payment of purchase price of the stock of such other stockholder in the Association shall not exceed the sum of $53,200." (R. 57-58).

"All moneys payable hereunder by the Company to the Association on account of (a) the purchase price of the stock of the Company in the Association, and (b) of the default of some other stockholder in the payment of the purchase price of the stock of such other stockholder in the Association, shall be paid by the Company to the Association and the United States jointly." (R. 58).

"In order to protect, secure, and insure the Association in the payment by the Company of any and all sums of money to become due to the Association under the terms of this contract, the Company agrees to make, execute, and deliver to the Association, its mortgage, in a form and containing such terms and conditions as are acceptable to the Association, covering all the lands, premises, water, water rights, water filings, rights of way, reservoir rights, buildings, structures, improvements, dams, pipe lines, flumes, conduits, ditches, canals, reservoirs, easements, water appropriations, franchises and appurtenances now owned, used, occupied, enjoyed, or possessed by the Company." (R. 59-60).

"The Company shall arrange to operate and maintain, without cost or expense to the Association, any and all canals and facilities (other than the works provided for in Article 2 hereof) necessary to take and utilize the water to which the Company is entitled under and by virtue of this subscription." (R. 59-60).

That on May 21, 1938, the petitioners herein, as plaintiffs below, brought an action in the district court in and for

Utah County, State of Utah against the respondents here and defendants in the court below, in which suit the petitioners herein sought to have declared null and void the attempt to amend the articles of incorporation of the Company, for the reason that a majority of the sockholders of the Company were without power to make such amendment to the articles of incorporation or to authorize the Comapny to enter into the proposed contract over the objections of a minority of the stockholders of the Company. In that action the facts above mentioned were in substance alleged in the complaint so filed. (R. 1 to 19). It was also alleged in the complaint so filed that petifioners here, plaintiffs below

> "and each of them, by reason of their ownership of shares of capital stock in the defendant company have and claim to have sufficient water with which to irrigate their lands and to provide for their needs, and each of their needs, and they, and each of them, will derive no substantial benefit from the purchase of additional water rights which it is proposed that the defendant, Provo Bench Canal & Irrigation Company, purchase pursuant to the resolution hereinbefore set out and the adoption of the proposed amendments to the Articles of Incorporation of the defendant company." (R. 14).

> "That if the Articles of Incorporation of the defendant company are amended as proposed, its stock will be rendered assessable and it will be permitted to engage in business and ventures not contemplated by and contrary to the contract entered into by its incorporators and their successors, and in violation of the provisions of Article I, Section 18, of the Constitution of Utah and Article I, Section 10, of the Constitution of the United States." (R. 15).

> "That if the defendants (in the court below, respondents here) enter into a contract as proposed

by Resolution above mentioned, plaintiffs and other stockholders of defendant company similarly situated will suffer irreparable injury, and likewise if the Articles of Incorporation are amended in the manner proposed as hereinbefore set out, plaintiffs (petitioners here) and other stockholders of defendant company similarly situated will suffer irreparable injury." (R. 15).

"That if the Articles of Incorporation of the defendant company are amended in the manner proposed as hereinbefore alleged, the defendant will, unless restrained and prohibited by this court, engage in a business and enterprise not contemplated by and contrary to the purpose for which said defendant company was organized, towit, in the business of buying and selling water rights, lands, water works, constructing dams, ditches, canals, reservoirs and other water works, will enter into a contract or contracts guaranteeing the payment of obligations of other corporations, particularly the obligations of the Provo River Water Users' Association, will incumber and otherwise render plaintiffs' stock liable for the payment of the cost and expenses of such undertakings and will levy assessments on plaintiffs' stock for the payment thereof." (R. 16)

In their prayer for relief the plaintiffs, petitioners here, prayed, among other things:

1.

"That the resolution purporting to authorize the Board of Trustees of the defendant, Provo Bench Canal & Irrigation Company, be declared null and void and that such resolution does not give said Board of Trustees power or authority to enter into a contract to purchase 2000 or any other number of shares of stock of the Provo River Water Users' Association." (R. 16).

2.

"That a majority of the stockholders of defendant

corporation are, and at the time of meeting of its stockholders, . . . were without power or authority to direct or authorize the Board of Trustees of defendant Provo Bench Canal & Irrigation Company to subscribe for stock of the Provo River Water Users' Association nor to authorize or empower such Board of Trustees to provide for the payment thereof in the manner attempted by said resolution, or at all, and that such Board of Trustees is, notwithstanding said resolution, without authority to enter into such or a similar contract on behalf of defendant company." (R. 16).

3.

"That the majority stockholders of defendant company are without power or authority to amend its Articles of Incorporation in the manner and to the extent attempted in the proposed amendments set out in this complaint, and particularly are the majority of the stockholders of defendant company without authority to so amend its Articles of Incorporation to permit said defendant company to purchase stock in other corporations and to obligate the defendant company for the payment of the purchase price thereof, or to permit the Board of Trustees or majority stockholders to levy any assessment upon the outstanding fully paid up capital stock of defendant company to pay for the purchase price of shares of stock or additional water rights; that the majority stockholders of defendant corporation are without power or authority to so amend its Articles of Incorporation so as to obligate defendant company by contract or otherwise to guarantee or become surety for the payment or the obligations of the United States or of any person, firm or corporation in which defendant company has acquired by subscription, or otherwise, shares of stock, water or water rights, or to levy any assessment on the fully paid up capital stock

of the defendant company for the payment of the debts or obligations of any person, firm or corporation other than the lawful debts and obligations of defendant company." (R. 16).

4.

"That the defendants in that case, respondents here, be perpetually enjoined from entering into the proposed contract." (R. 17).

That the defendants in that case, respondents here, filed a demurrer to the complaint, which demurrer was overruled, and the defendants in that case filed their answer. In the main the answer admitted the allegations of the complaint. They however alleged that they had no knowledge or information as to whether or not the plaintiffs below, petitioners here, had sufficient water to irrigate their lands, and therefore denied the same, and put them upon their proof. (R. 20). They denied that the amendments of the articles of incorporation of the company in the manner proposed would permit the company to engage in a business or venture not authorized by or contrary to the contract entered into by its incorporators and their successors as contained in the articles of incorporation. (R. 16). They also denied that the proposed amendments to the articles of incorporation or to entering into the proposed contract was in violation of the provisions of

Article I, Section 18, of the Constitution of Utah,
or
Article I, Section 10, of the Constitution of the United States.

(R. 15). They also denied that the petitioners here, plaintiffs below, would be irreparably injured if the Company entered into the proposed contract. (R. 15). To the answer petitioners here, paintiffs below, filed a reply.

There was no controversy concerning the facts at the trial, as the parties entered into a written stipulation as to the facts and the trial court made findings in accordance with the facts so stipulated. The plaintiffs below, petitioners here, offered evidence in support of their allegation that they had a sufficient water supply and would not derive any benefit from the purchase of additional water. The trial court, however, refused to admit such evidence upon the ground that it was immaterial. (R. 61).

Upon the facts so stipulated and found the trial court entered its conclusions of law to the effect that the majority of the stockholders of the Company were without power or authority over the objection of the minority stockholders to amend the articles of incorporation of the Company, by providing that the Company may

"1. (a) Acquire, by purchase, water and water rights.

(b) Enter into a contract for the purchase of water or water rights.

(c) Purchase stock in other corporation.

(d) Deliver its promissory notes, guarantees, mortgages or other obligations for the purpose of acquiring water or water rights.

(e) Become surety for the payment or performance of any contract, promissory note or other obligation for the purchase of additional water or water rights, when the purchase price of such water rights is to be paid for by levying assessments on all of the capital stock of the defendant company." (R. 61).

"2. That a majority of the stockholders of defendant company are without authority to bind the minority stockholders or to authorize the defendant company to enter into a contract for the

purchase of additional water or water rights to be paid for by levying assessments on the stockholders of the Company." (R. 62).

"3. That the defendant company is without authority to enter into the contract set out in the Findings of Fact." (R. 62).

"5. That the amendment of the Articles of Incorporation of the Provo Bench Canal & Irrigation Company in the particulars mentioned in number one of these Conclusions of Law, constitutes a material and fundamental change in the Articles of Incorporation of the defendant company, and as such, constitutes an impairment of the contract entered into by the incorporators of the defendant company, contrary to the provisions of Article I, Section 18, of the Constitution of the State of Utah, and of Article I, Section 10 of the Constitution of the United States." (R. 62).

"6. That if the proposed contract set out in the Findings of Fact is entered into and the terms there carried out, the same would constitute an impairment of the contract entered into by the incorporators of the defendant company and would be in conflict with the provisions of Article I, Section 18, of the Constitution of the State of Utah, and of Article I, Section 10, of the Constitution of the United States." (R. 62-63).

"7. That plaintiffs are entitled to have a decree entered in this cause, enjoining the defendant, Provo Bench Canal & Irrigation Company, from entering into the proposed contract set out in the Findings of Fact herein." (R. 63).

The trial court entered a decree wherein it was ordered, adjudged and decreed:

"1. That the defendants, and each of them, for and on behalf of the defendant, Provo Bench Canal & Irrigation Company, a corporation, are hereby

enjoined from entering into and from performing the contract heretofore set out in the Findings of Fact heretofore made and entered in this cause." (R. 63-64).

The defendants in the court below, respondents here, prosecuted an appeal from the decree so entered to the Supreme Court of the State of Utah, which is the highest court of the State of Utah. By their assignments of error they attack the order overruling the demurrer to the complaint, to the conclusions of law and to the decree. (R. 64-68). The petitioners here, plaintiffs below, by cross-assignments of error, attack the ruling of the trial court in refusing to admit evidence tending to show that plaintiffs below, petitioners here, already have sufficient water to supply their needs and that therefore the purchase of additional water by the Company could be of no substantial benefit to them. (R. 69).

That thereafter the defendants below, respondents herein, filed their printed brief, wherein it was contended that a majority of the stockholders of the Company had authority to amend the articles of incorporation in the manner that they were to be amended under the provisions of

R. S. U. 1933, 18-2-44.

They also argued that the company may, when the articles of incorporation are amended to so provide, purchase stock in the Association pursuant to the provisions of

R. S. U. 1933, 100-1-13.

That thereafter plaintiffs filed their printed brief with the Supreme Court of the State of Utah. In their brief at pages 10 to 38 plaintiffs specifically argued that the enactment of a law permitting the majority stockholders of the Company to amend its articles in the manner proposed constitutes an impairment of the contract contained in the articles of incorporation of the Company, and, as such, offends against

Article I, Section 10 of the Constitution of the United States,

and that if the additional water is purchased by the company and paid for by assessments levied against stockholders of the Company it will result in the confiscation of plaintiffs' property.

Again on pages 39 to 44 of plaintiffs' printed brief they argued that if the proposed contract between the Company and the Association is entered into and its terms carried out it will result in the taking of plaintiffs' property without due process of law and will constitute an impairment of the contract contained in the articles of incorporation of the defendant company. That thereafter a hearing was held before the Supreme Court of the State of Utah, at which hearing the parties presented their points to said Court by oral agreement and thereafter the Supreme Court of the State of Utah, on April 19, 1940, rendered its decision and judgment. (R. 70 to 78). The decisions and judgment of the Supreme Court of the State of Utah reversed the decree and judgment of the district court and in effect held that the majority stockholders of the Company could lawfully amend the articles of incorporation in the manner proposed and that the Board of Trustees of the Company could lawfully enter into the proposed contract for and on behalf of the company and that when such contract was entered into its terms could lawfully be enforced. (R. 78).

That thereafter plaintiffs' timely presented their petition for rehearing to the Supreme Court of the State of Utah. (R. 81-82). Plaintiffs also filed a printed brief in support of their petition for rehearing and specially called the attention of that Court to the provisions of

> R. S. U. 1933, 100-1-14, as Amended by Chapter 130, Page 237, Laws of Utah, 1937,

wherein it is provided that:

> "All water hereafter appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to use the water, so long as the water is used beneficially thereon; provided, if for any

reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may, on application to the State engineer, be severed from said land and simultaneously transferred to and become appurtenant to other land without losing priority of right theretofore established, if such change can be made without detriment to existing rights. All changes shall be made only in the manner provided by Section 100-3-3, Revised Statutes of Utah, 1933, as amended by this act, and not otherwise."

Plaintiffs again argued that if the proposed contract was executed and carried out and the petitioners compelled to pay assessments and/or calls on the stock owned by them in the Company, it would in effect constitute a confiscation of their property and property rights. Defendants filed a printed brief in answer to plaintiffs' brief on rehearing and plaintiffs filed a printed reply brief to the answering brief of defendants. That thereafter without further opinion, and on November 12, 1940, the Supreme Court of the State of Utah denied plaintiffs' petition for rehearing. (R. 83). The opinions so rendered by the Supreme Court of Utah are not yet published in Utah Reports but will be found in

101 Pac. (2d) 375.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

That the Supreme Court of the State of Utah has decided a Federal question of substance not heretofore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court, in the following particulars:

(a) That notwithstanding a mutual irrigation company is organized for the sole purpose of con-

veying water from Provo River to Provo Bench and lands adjacent thereto and to regulate and control the same for the purpose of irrigation, such articles of incorporation may be amended by a majority vote of the stockholders of fully paid up capital stock of the Company so that the Company may, among other things, enter into contracts with the United States or with other parties for the purchase, acquisition or lease of water rights and lands, easements in lands, dams, reservoirs, canals and necessary irrigation works, or parts thereof, and contract with the United States or other parties for the construction of such works, and also

(b) To mortgage, pledge or otherwise encumber its property, both real and personal, to secure the payment of its debts and obligations.

(c) To subscribe for, purchase or otherwise acquire and own stock in other corporations organized or to be organized and to purchase its own capital stock and to make and deliver its obligations, to secure, guarantee and become surety for the payment or performance of any obligations that have been or may be entered into by the corporation in which the Company owns or has subscribed for stock.

2.

That notwithstanding a substantial minority of the stockholders of a mutual irrigation company may have a sufficient water right to supply their needs, a majority of the stockholders may authorize the Board of Trustees of the Company and such board of trustees may enter into and enforce a contract for the purchase of water under a project to be constructed and controlled by the United States, notwithstanding the law of the State of Utah requires that such water be made appurtenant to specified lands, and

notwithstanding the Company owns no land to which the water may be made appurtenant, and also notwithstanding a minority of the stockholders cannot put any part of the purchased water to a beneficial use.

3.

That notwithstanding the objection of a substantial number of minority stockholders of a mutual irrigation company a majority of the stockholders of such company may authorize and the board of trustees may enter into and enforce the performance of a contract for the purchase of additional water to be used for irrigation purposes on the land to which it is to be appurtenant and the purchase price must be paid for, not by the persons owning the land to which the water is made appurtenant, but by assessments levied equally on the stock of the Company without regard to the amount of water, if any, that any given stockholder may be able to beneficially use.

4.

That a majority of the stockholders of a mutual irrigation company may authorize the execution of a mortgage on all of its property as security for the payment of the purchase price of the water for the default of other stockholders who fail to pay for the stock subscribed by them and for the maintenance of the irrigation works necessary to develop the water and the storage of the same, notwithstanding the protesting minority stockholders may be unable to beneficially use any of such water, and notwithstanding some of the protesting minority stockholders may not own or occupy any land to which the water can be made appurtenant.

5.

That a majority of the stockholders of a mutual irrigation company may authorize the execution and enforcement of a contract for the purchase of additional water and the maintenance of a system of water works and enforce the payment of the costs and expenses thereof by the stockholders or suffer their stock to be sold for assessments

without regard to the amount of benefit, if any, derived or to be derived by the various stockholders.

That such is the legal effect of the decree of the Supreme Court of the State of Utah was called to its attention by the plaintiffs both upon the original hearing and in their brief in support of their petition for rehearing, and the contention made that the execution and enforcement of such contract constituted an impairment of the contract of incorporation of the Company and would result in the confiscation of plaintiffs' property.

Such are the reasons which petitioners urge in support of their petition for a writ of certiorari from this Court to the Supreme Court of the State of Utah.

JURISDICTION OF THIS COURT

The date of the judgment and decree to be reviewed is April 19, 1940, (R. 81), to which a petition for rehearing was duly filed and was denied on November 12, 1940. (R. 83). Upon application of petitioners under date of February 5, 1941, Honorable Associate Justice Stanley Reed granted petitioners to March 12, 1941 in which to file petition for writ of certiorari. The statutory provisions which are believed to sustain the jurisdiction of this Court are

Paragraphs A and B of Section 344, Title 28, U.S.C.A.,

whereby it shall be competent for this Court to review and determine any cause wherein a final judgment has been entered in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decisions in favor of its validity, and

Paragraph B of Said Section 344, Title 28, U.S.C.A.,

whereby it shall be competent for this Court to review and determine any cause wherein a final judgment has been

entered by the highest court of the State in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed by either party under a statute or the Constitution of the United States. Also under Rule 38, Paragraph 5, Section A of the revised rules of this Court, wherein it is provided that a review on a writ of certiorari may be had where a State Court has decided a federal question of substances not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decision of this Court.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Utah, commanding that Court to certify and send to this Court a full and complete transcript of the record of proceedings of said Court had in the case numbered and entitled on its docket No. 6133, John Fower, W. J. Cordner, M. E. Kartchner, Jr., and Ray E. Loveless, plaintiffs and respondents, vs. Provo Bench Canal & Irrigation Company, a corporation, and its Board of Trustees, Ray V. Wentz, A. G. Keetch, Leonard Walker, John Stratton, Emery McKellip, Niels Anderson and A. Lowe, defendants and appellants, to the end that said cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of said Supreme Court of Utah be reversed by this Court and the judgment of the district court of Utah County, State of Utah, in said cause be affirmed; and for such further relief as to this Court may seem proper.

JOHN FOWER,
W. J. CORDNER,
M. E. KARTCHNER, JR.,
RAY E. LOVELESS.

By ELIAS HANSEN,
WM. A. HILTON,
Counsel for Petitioners.